RECORD AND BRIEFS

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP AND ERNST AND YOUNG U.S.,LLP,
Petitioners,

v.

STEPHEN MORRIS AND KELLY MCDANIEL,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC., *ET. AL.*,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
Fifth, Seventh and Ninth Circuits

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS IN NOS. 16-285 AND 16-300 AND RESPONDENT IN NO. 16-307

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QUESTION PRESENTED

Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* Atlantic Legal Foundation states that Atlantic Legal Foundation is a not-for-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

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INTEREST OF *AMICUS CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory council consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business

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[1]All parties have consented to the filing of this brief and the consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

and commerce and in alleviating the burdens on courts and parties.

The interest of the Foundation in the promotion of arbitration as an efficient alternative to protracted litigation is exemplified by its participation as *amicus* or as counsel for *amicus* in other cases before this Court involving enforceability of contractual arbitration provisions, including *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015) and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

Amicus believes that the decisions of the Courts of Appeals for the Seventh and Ninth Circuits in this case, holding that waivers of the right to demand class arbitration violate section 7 of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA) and are unenforceable, are inconsistent with the purposes of the Federal Arbitration Act (FAA) and both the long-standing and recent teaching of this Court regarding arbitration. Those decisions, if allowed to stand, will deter many employers from incorporating arbitration as a dispute resolution mechanism in their dealings with employees, thus frustrating a fundamental purpose of the FAA.

Amicus also believes that the decision of the Court of Appeals for the Fifth Circuit is correct and that the rulings of the National Labor Relations Board flout directly applicable decisions of this Court and are entitled to no deference.

PRELIMINARY STATEMENT

Employers and employees often enter into employment contracts providing for the arbitration of all disputes arising from the employment relationship. Those arbitration provisions in those contracts often require that claims be resolved on an individual basis and include class waivers.

This Court has recognized that there are "real benefits" to arbitration generally and in "the employment context." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122-23 (2001). "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation." *Id.* at 123.[2]

Arbitration is also frequently more expeditious than full-blown litigation. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985). Class or collective proceedings would "make the process slower, more costly, and more likely to generate procedural morass than final judgment," thus negating the "principal" benefits of arbitration. *AT&T Mobility LLC* v. *Concepcion*,

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[2] This Court has also recognized that Congress enacted the Federal Arbitration Act, 9 U.S.C. §§ 1-16, to overcome the "old common-law hostility toward arbitration," *Southland Corp.* v. *Keating*, 465 U.S. 1, 14 (1984) and the long history of "judicial hostility" to arbitration. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974). That hostility "manifested itself in a great variety of devices and formulas declaring arbitration against public policy." *Concepcion*, 563 U.S. at 342 (internal quotation marks and citation omitted).

563 U.S. 333, 348 (2011). Employers and employees often agree to class waivers to preserve the "fundamental attributes of arbitration." *Id.* at 344.

The question in these consolidated cases is whether those class waivers are enforceable. Amicus submits that the answer is "yes."

Section 2 of the Federal Arbitration Act (FAA) states that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Recognizing the benefits of arbitration (see *Concepcion*, 563 U.S. 333, 344, 345 (2011)), the FAA establishes a presumption in favor of enforcing arbitration agreements as written that can be overcome by another statute only if that statute is a "congressional command" that is contrary to the FAA's mandate.

This Court has consistently recognized that the FAA reflects "a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract." *Concepcion*, 563 U.S. at 339-40 (internal quotation marks and citation omitted); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Buckeye Check Cashing Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006). "[C]ourts must rigorously enforce arbitration agreements according to their terms."

Amer. Express Co. v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (internal quotation marks and citation omitted); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Concepcion*, 563 U.S. at 339. The obligation to "rigorously enforce" arbitration agreements includes terms requiring the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g., Am. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352 (2011).

Employment agreements are no exception to that general rule, *see Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001), nor are arbitration agreements that require individual arbitration, *see Concepcion*, 563 U.S. at 345-352. The general rule applies as well to agreements to arbitrate federal statutory claims, unless "the [FAA's] mandate has been overridden by a contrary congressional command." *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 98 (2012) (internal quotation marks and citations omitted).

Section 7 of the NLRA, 29 U.S.C. § 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a) of the NLRA makes it an "unfair labor practice" for an employer to "interfere with, restrain, or coerce

employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. § 158(a). The NLRA does not contain any reference to class or other collective dispute-resolution procedures, either through arbitration or in litigation.

The cases now before the Court present an important question: Whether an arbitration provision in an employment agreement that requires an employee to arbitrate claims on an individual basis is valid and enforceable under the FAA or whether the NLRA overrides the FAA. *Amicus* submits that the FAA mandates enforcement of the arbitration provisions at issue.

The Decisions Below

Seventh Circuit - *Epic Systems*, No. 16-285

The Seventh Circuit Court of Appeals concluded that "[a] collective, representative, or class legal proceeding is * * * a 'concerted activit[y]'" under NLRA Section 7. Pet.App. 10a (brackets in original), and Section 8 of the NLRA prohibits an employer from interfering with an employee's right to engage in concerted activity, 29 U.S.C. § 158(a)(1). Thus, the court held, the NLRA renders the waiver of class and collective proceedings "unenforceable." Pet. App. 11a.

The Seventh Circuit began its analysis by adopting the NLRB's reasoning – promulgated in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012) – that engaging in class, collective or representative proceedings is "concerted activity" and a protected right under Section 7 of the NLRA, and thus it

would be an unfair labor practice under Section 8 of the NLRA for an employer "to interfere with, restrain, or coerce employees in the exercise" of this right. According to the Seventh Circuit, the NLRA's legislative history and purpose indicated that "concerted activity" unambiguously includes representative, class, joint and collective actions. Further, even if the court were to find the term "concerted activity" ambiguous, it would then have to defer to the NLRB's interpretation of that term and find the class action waiver to be unlawful.

Epic argued that because class actions under Rule 23 of the Federal Rules of Civil Procedure did not exist when Congress enacted the NLRA in 1935, Congress could not have intended Rule 23 class actions to be "concerted activity" under the NLRA. The court, however, held that "concerted activity" is not limited to what was "concerted activity" in 1935. Also, the arbitration agreement not only waived Rule 23 class actions, it waived all forms of representative, collective or joint proceedings, and these types of proceedings, including collective actions under §216(b) of the FLSA, existed prior to 1935.

The Seventh Circuit rejected the argument, accepted by all the other circuits that had theretofore ruled on the matter, that the arbitration agreement must be enforced under the Federal Arbitration Act (FAA). The court even went so far as to say that "it is not clear to us that the FAA has anything to do with this case." 823 F.3d at 1156. Nevertheless, the court proceeded to

examine whether there was a conflict between the FAA's mandate to place arbitration agreements on the same footing as any other contract and the NLRA. In doing so, the court addressed the FAA's "savings clause," contained in 9 U.S.C. § 2, which provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (citing 9 U.S.C. § 2) and "[i]llegality is one of those grounds." 823 F.3d at 1157. The court found that the savings clause provided a way to harmonize the NLRA and FAA, by finding the agreement's class waiver to be unenforceable. According to the Seventh Circuit panel, the agreement to resolve employment disputes by individual arbitration is illegal under the NLRA, and because an illegal agreement is not enforceable under the FAA's savings clause, there is no conflict between the FAA and NLRA. *Id.*

Finally, the Seventh Circuit rejected Epic's argument that even if Section 7 protects a right to class or collective actions, the right is merely procedural, not substantive, and the FAA requires enforcement of the agreement since it does not involve the forfeiture of a substantive right. The panel rejected this argument because it found the right to engage in "concerted activity" through class or collective actions to be a "substantive" right under the NLRA, even though the class action device itself is procedural; since the arbitration agreement required employees to relinquish a right that the NLRB has declared to

be substantive, the arbitration agreement was not enforceable under the FAA.

The Seventh Circuit acknowledged that the Fifth Circuit in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013) had come "to the opposite conclusion," 823 F.3d at 1157, and that it was "creat[ing] a conflict in the circuits." *Id.* at n.†.

Ninth Circuit - *Ernst & Young*, No. 16-300

The Ninth Circuit Court of Appeals panel majority began by analyzing the NLRA and concluded that Section 7 "protects a range of concerted employee activity, including the right to seek to improve working conditions through resort to administrative and judicial forums," *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 981 (2016) (internal quotation marks and citation omitted) and establishes a "substantive right" for employees "to pursue work-related legal claims, and to do so together." *Id.* at 983.

The arbitration provision in the Ernst & Young employment agreement, the majority held, "prevents concerted activity by employees in arbitration proceedings, and the requirement that employees only use arbitration prevents the initiation of concerted legal action anywhere else." *Id.* at 983. The arbitration provision thus interferes with "a protected § 7 right in violation of § 8" and "[t]hus, the 'separate proceedings' terms in the Ernst & Young contracts cannot be enforced." *Id.* at 984.

The FAA "does not dictate a contrary result," the majority reasoned, because "[t]he illegality of the 'separate proceedings' term here has nothing to do with arbitration as a forum," *id.* at 985, and "[i]rrespective of the forum in which disputes are resolved, employees must be able to act in the forum *together*," *Id.* at 989 (emphasis in original).

The Ninth Circuit majority concluded that petitioners' arbitration provision was prohibited by the NLRA and thus unenforceable, under the FAA's saving clause, which provides that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract," (citing 9 U.S.C. § 2.) *Id.* at 989.

Circuit Judge Ikuta dissented. 834 F.3d 990-998. She cogently wrote that "This decision is breathtaking in its scope and in its error; it is directly contrary to Supreme Court precedent, *id.* at 990. "Contrary to the majority's focus on whether the NLRA confers 'substantive rights,'" she wrote, "in every case considering a party's claim that a federal statute precludes enforcement of an arbitration agreement, the Supreme Court begins by considering whether the statute contains an express 'contrary congressional command' that overrides the FAA," *id.* at 992, and that the NLRA contained nothing "remotely close" to a "contrary congressional command" that mention arbitration nor specify the right to take legal action at all, whether individually or collectively." *Id.* at 995.

Judge Ikuta also rejected the majority's reliance on the FAA's saving clause. She contended that the majority's reasoning was based on the erroneous premise that collective-action waivers are illegal, when, in her view, such a waiver "would be illegal only if it were precluded by a 'contrary congressional command' in the NLRA, and here there is no such command." *Id.* at 997. Judge Ikuta further reasoned that, even if the NLRA could be interpreted as giving employees a substantive, nonwaivable right to classwide actions, such a purported right would "disproportionately and negatively impact arbitration agreements by requiring procedures that 'interfere[] with fundamental attributes of arbitration.'" *Id.* (quoting *Concepcion*, 563 U.S. 333, 344 (2011)), The majority's reasoning that section 7 of the NLRA complies with the FAA simply because it "applies equally to arbitration and litigation." was "expressly rejected" by Concepcion. *Id.* at 338.

Judge Ikuta concluded by observing that the majority's rule was "directly contrary to Congress's goals in enacting the FAA," and the majority "exhibit[ed] the very hostility to arbitration that the FAA was passed to counteract." *Id.* at 998.

The Ninth Circuit majority recognized that its ruling is at odds with decisions of three other courts of appeals – including a decision of the Second Circuit involving the same defendants (petitioners here) – which held that the identical arbitration provision at issue here is enforceable.

See Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013).[3]

Fifth Circuit - *NLRB v. Murphy Oil*, No. 16-307

In *Murphy Oil USA, Inc.* v. *N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015), the Fifth Circuit addressed the legality of individual arbitration agreements under Sections 7 and 8(a) of the NLRA and, as it had in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013), once again upheld the legality of an arbitration agreement that contained a waiver of the right to commence or participate in class-wide arbitration or litigation.

Murphy Oil's arbitration agreement provided that employees must individually "resolve any and all disputes or claims...which relate...to Individual's employment...by binding arbitration." Several employees filed a FLSA collective action and Murphy Oil moved to dismiss the suit and to

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[3] The Second Circuit, in *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (per curiam), held that a class waiver in an arbitration clause in the employment context is enforceable, in a case involving the very same agreement as is at issue in No. 16-300. The *Sutherland* court found that neither the FLSA nor the NLRA was a "contrary congressional command" that overrode the FAA. *Id.* at 296-97 & n.8. The Second Circuit reached this conclusion even though the NLRB had decided otherwise; the court "decline[d] to follow" the Board's views. *Id.* It held that an employment arbitration agreement is enforceable under the FAA. *Id.* at 292-93, 299 (citing *Amer. Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

compel arbitration. One of the plaintiff employees filed an unfair labor charge with the NLRB alleging that the agreement unlawfully interfered with employees' Section 7 rights guaranteed by the NLRA.

In October 2014, ten months after the Fifth Circuit's ruling in *D.R. Horton*, the NLRB issued its *Murphy Oil* opinion, *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014). The Board disregarded the Fifth Circuit's ruling in *D.R. Horton* and instead reaffirmed its previous position that an arbitration agreement similar to Murphy Oil's violated the NLRA because the agreement restricted Section 7 rights to engage in concerted activity. The NLRB applied its *D.R. Horton* decision, *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), to disallow Murphy Oil's arbitration agreement and concluded that both the original and amended Murphy Oil arbitration agreements could be interpreted as unlawfully prohibiting employees from filing unfair labor practice charges, and thus required corrective action.[4] *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014).

Murphy Oil petitioned the Fifth Circuit to review the NLRB decision that ignored the Court's *D.R. Horton* ruling. The court considered Murphy

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[4] After the Fifth Circuit's *D.R. Horton* decision, Murphy Oil revised its agreement to include language clarifying that the agreement did not bar employees from "participating in proceedings to adjudicate unfair labor practice[] charges before the Board."

Oil's pre- and post-*D.R. Horton* agreements separately because the agreements had different language. The Fifth Circuit concluded that the original agreement was problematic because its language that employees waived the right to pursue collective or class claims for "any and all disputes or claims...which relate...to Individual's employment" could have a chilling effect on employees' ability to act collectively, and thus constituted an unfair labor practice, because it could be interpreted to mean that the employee could not file unfair labor practice charges with the NLRB.

The Fifth Circuit found that Murphy Oil's revised arbitration agreement did not violate the NLRA because an employee could not reasonably interpret the revised agreement as prohibiting the filing of unfair labor practice charges. The court held that Murphy Oil had not committed an unfair labor practice by enforcing its arbitration agreement. 808 F.3d at 1019.

The *Murphy Oil* decision is grounded in the principle that individual arbitration agreements are not per se unfair labor practices. *Id.*

SUMMARY OF ARGUMENT

This case concerns a purported conflict between section 2 of the FAA, which requires that arbitration agreements be enforced according to their terms, and section 7 of the NLRA, which the employee Respondents and the NLRB contend prohibits provisions such as the one contained in

the agreements between the employers and employees at issue here which stipulate that all employment disputes be resolved through individual arbitration.

Section 2 of the FAA provides in clear language that arbitration agreements must be enforced according to their terms. The employees and the NLRB, as the parties seeking to avoid arbitration pursuant to the terms of their agreements have the burden of showing that the NLRA contains a clear command that is contrary to the FAA's mandate to enforce arbitration agreements according to their terms.

The Court has a long and clear body of precedent that teaches that the FAA's command to enforce arbitration agreements according to their terms will be overridden only by a clear contrary congressional command in another federal statute. The burden of proving that a federal statute displaces the FAA is on the party seeking to avoid arbitration. That burden has not been met in any case in which the statute in question does not expressly prohibit arbitration, and this Court has rejected litigants' attempts to avoid arbitration by asserting that another federal statute displaces the FAA.

In this case, the employee Respondents and the NLRB cannot show that Congress intended the NLRA to override the FAA so as to preclude enforcement of arbitration agreements in general or agreements to arbitrate on an individual basis in particular. Section 7 of the NLRA, upon which

the employees and the NLRB rely, contains no language about arbitration, litigation, or any dispute-resolution mechanism; it does not mandate the availability of a judicial forum or collective dispute-resolution procedures in employment disputes. Their reliance on Section 7's "residual clause" fails because its language falls short of the specific language in other statutes that this Court has held to be insufficient to constitute a congressional "command" that overrides the FAA.

The legislative history of the NLRA does not indicate a congressional intent to preclude agreements to arbitrate on an individual basis or agreements to arbitrate generally.

The underlying purposes of the NLRA are not inconsistent with agreements to arbitrate employment-related disputes individually. The principal purpose of the NLRA is to minimize industrial strife by encouraging self-organization and collective bargaining. Read in that light, the residual clause of section 7 of the NLRA has nothing to do with arbitration or litigation.

The saving clause of section 2 of the FAA permits courts to deny enforcement of an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." The clause applies where a generally applicable doctrine prohibits the enforcement of a contract – in this instance, an arbitration agreement. The saving clause preserves generally applicable contract defenses such as fraud or lack of capacity or lack of consideration, but does not

"save" defenses that discriminate against or apply only to arbitration.

The Seventh and Ninth Circuits invoked the generally applicable "illegality" defense recognized in most States. Those courts reasoned that the NLRA confers a nonwaivable substantive right to invoke collective-litigation procedures, making it "illegal" to enforce a contract that waives that right, triggering the saving clause. But in these cases, the courts of appeal conflated common law "illegality" defenses (which the FAA was largely enacted to overcome as they pertained to arbitration agreements, see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22-23 (1983)) with the "clear conflicting command" concept. The decisions of the Seventh and Ninth Circuits are incorrect. They ignore this Court's teaching that the overriding purpose of the FAA is to advance "a liberal federal policy favoring arbitration agreements" and that arbitration agreements must be enforced according to their terms, *Concepcion*, 563 U.S. at 339, that the foregoing principle applies even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command which must be expressed with "clarity." *CompuCredit*, 565 U.S. at 98.

ARGUMENT

I. EMPLOYMENT AGREEMENTS REQUIRING INDIVIDUAL ARBITRATION ARE ENFORCEABLE ABSENT A CONTRARY CONGRESSIONAL COMMAND

Section 2 of the FAA provides that "[a] written provision in any * * * contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

This Court has repeatedly held that the FAA embodies "a liberal federal policy favoring arbitration agreements." *Moses H. Cone*, 460 U.S. at 22-23; *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Consistent with that policy, the Court has repeatedly held that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration") and has consistently upheld the FAA's policy favoring enforcement of arbitration agreements as written. *See, e.g.*, *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463 (2015); *Italian Colors*, 133 S. Ct. 2304; *CompuCredit*, 565 U.S. 95 (2012); *Concepcion*, 563 U.S. 333; *Stolt-Nielsen*, 559 U.S. 662.

The obligation to "rigorously enforce" arbitration agreements includes terms requiring

the parties to arbitrate disputes individually, rather than on a class or collective basis. *See, e.g.*, *Italian Colors*, 133 S. Ct. 2304, 2308-10 (2013); *Concepcion*, 563 U.S. at 352 (2011).[5] The foregoing principle applies "even when the claims at issue are created by federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *CompuCredit*, 565 U.S. at 98 (citation and internal quotation marks omitted).

The advantages of arbitration include the use of "efficient, streamlined procedures" that "reduc[e] the cost and increas[e] the speed of dispute resolution." *Concepcion*, 563 U.S. 333, 344, 345 (2011).[6] The advantages of the arbitration process do not "somehow disappear when transferred to the employment context." *Circuit City Stores*, 532 U.S. 105, 123 (2001). If anything, those advantages

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[5] This follows from "the fundamental principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010).

[6] There are other advantages to arbitration, not cited in this Court's decisions. Among them are: arbitration may result in more accurate outcomes because of arbitrator expertise; arbitration may enhance the ability of parties to have their disputes resolved using rules of particular trades or industries; and arbitration may better protect confidential information from disclosure. See C. R. Drahozal & S. J. *Ware, Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 Ohio St. J. on Disp. Resol. 433, 451-52 (2010). In addition, arbitration has a societal benefit because it alleviates burdens on the judicial system.

may be "of particular importance" in the context of employment litigation, which "often involves smaller sums of money than disputes concerning commercial contracts," *Id.*

a. The NLRA Does Not Conflict With The FAA

The party challenging the arbitration agreement has the burden of showing that "Congress intended to preclude a waiver of the judicial forum." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Congress's intent to supersede the FAA must be expressed with "clarity," *CompuCredit*, 565 U.S. at 103, and "any doubts * * * should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also CompuCredit*, 565 U.S. at 109.

The Court's discussion of the specificity required of the "conflicting" statute to come within the exception of FAA section 2 in *CompuCredit* is instructive. As the Court in that case concluded, absent such a clear expression of Congressional intent to exclude certain types of disputes from the ambit of private dispute resolution encouraged and sanctioned by the FAA, courts must give effect to the FAA's mandate to enforce arbitration provisions according to their terms. *See*, *CompuCredit*, 565 U.S. at 104.

Section 7 of the NLRA is silent as to the issues in these cases – arbitration, individual arbitration, class arbitration – or, more broadly, class action lawsuits, litigation generally, or any other mode of dispute resolution.

Section 7 of the NLRA provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

29 U.S.C. § 157. That section does not by its terms proscribe arbitration and it contains no language guaranteeing the recourse to a court to resolve disputes between employers and employees. It contains no reference to class or other collective dispute-resolution procedures.

In cases where the statute alleged to conflict with the FAA and thus trigger the "conflicts" clause does not explicitly prohibit arbitration, the Court has rejected attempts to invoke the other federal statute to supersede the FAA. Numerous important remedial federal legislative regimes have been found not to conflict with and override the FAA's mandate to enforce arbitration agreements. *See, e.g.*, the Sherman Act, in *Italian Colors*, 133 S. Ct. at 2309-12 and in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628-39 (1985); the Credit Repair Organizations Act, in *CompuCredit*, 565 U.S. at 99-105; the Truth in Lending Act in *Green Tree Financial Corp.* v. *Randolph*, 531 U.S. 79, 90-92 (2000); the Securities Exchange Act of 1934 in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-21

(1974), and, most relevant here because it arose in the context of an employment relationship, the Age Discrimination in Employment Act in *Gilmer*, 500 U.S. at 26-33.

Respondents and the NLRB relied below on the clause at the end of section 7 which gives employees the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The language of that residual clause does not come close to demonstrating a clear intent to preclude individual arbitration. *CompuCredit*, 565 U.S. at 100. Indeed, the most natural reading of that clause is that it pertains to the items which follow it and which concern collective bargaining and union organizing. These are also the overarching purposes of, and background for, the enactment of the NLRA as a whole, so this natural reading is consistent with the purposes of the NLRA.[7]

Even if the right to "engage in other concerted activities" could be construed as creating a right for employees to pursue employment claims collectively, that would not amount to a clear congressional command to override the FAA. The

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[7] The purpose of the NLRA was to minimize industrial strife by "encouraging . . . collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151; *see also* 29 U.S.C. § 157.

Court has addressed this question in analogous cases. In *Italian Colors*, 133 S. Ct. at 2311, the Court observed that in *Gilmer*, the Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." In *CompuCredit*, this Court held that although the alleged conflicting statute, the Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679-1679j, contains an express right to file suit in federal court, that language did not "establish the contrary congressional command overriding the [FAA]." 565 U.S. at 100-101 (internal quotation marks and citation omitted). The language of section 7 of the NLRA is much less specific than the "guarantees" of the right to sue in court at issue in *CompuCredit* and the express right of employees to take collective action at issue in *Gilmer*.[8]

The legislative history of the NLRA provides no evidence of a congressional intent to preclude agreements to arbitrate on an individual basis or to arbitrate more generally. There was no "discuss[ion] [of] the right to file class or

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[8] The Court in *CompuCredit* remarked that if Congress had intended to bar arbitration of consumers' claims, "it would have done so in a manner less obtuse than what respondents suggest," and it gave examples of congressional commands that would be sufficiently clear. *CompuCredit*, 565 U.S. at 102. The same observation applies in these cases as well.

consolidated claims against employers" at all. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 361 (5th Cir. 2013).

Finally, there are no underlying purposes of the NLRA, discussed *supra*, n. 6, that are inconsistent or irreconcilable with individual arbitration.

In sum, nothing in section 7 of the NLRA, its legislative history, or purposes can be construed as a "clear command" by Congress to preclude arbitration, or individual arbitration, or other dispute resolution methods. And absent such a clear expression of intent, courts must give effect to the Arbitration Act's unambiguous mandate to enforce arbitration provisions according to their terms. *See, e.g.*, *CompuCredit*, 565 U.S. at 104.

b. The Saving Clause In Section 2 Of The FAA Does Not Preclude Contractual Obligations To Arbitrate Individually

The Seventh and Ninth Circuit Courts of Appeals held, and the NLRB argued to the Fifth Circuit, that the contractual waiver of the employees' rights to use collective-litigation procedures to resolve employment-related disputes was "illegal" under Sections 7 and 8 of the NLRA and therefore unenforceable under the saving clause. The saving clause permits courts to decline to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The "grounds * * * for the revocation of any contract" refers to "generally applicable doctrines of contract law," such as fraud, duress, or unconscionability, but not defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. *Concepcion*, 563 U.S. at 339.

The Seventh and Ninth Circuits attempted to misapply the saving clause in a manner reminiscent of the "great variety" of "devices and formulas" "declaring arbitration against public policy" that prompted the enactment of the Arbitration Act in the first place. *Concepcion*, 563 U.S. at 342 (internal quotation marks and citation omitted).

Respondent's and the NLRB's contention that the FAA's saving clause obviates the obligation to resolve employment disputes in individual arbitration is inconsistent with this Court's decision in *Concepcion*. There, the Court explained that, "when a doctrine normally thought to be generally applicable * * * [is] applied in a fashion that disfavors or interferes with arbitration," it does not trigger the saving clause.[9] *Concepcion*, 563

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[9] The "saving clause" argument made below by respondents and accepted by the Seventh and Ninth Circuits is of a kind with the "devices and formulas" "declaring arbitration against public policy" that motivated Congress to enact the FAA in the first place. *Concepcion*, 563 U.S. at 342 (internal quotation marks and citation omitted).

(continued...)

U.S. at 341. This Court there determined that a defense that precludes the waiver of class or collective arbitration is not generally applicable because "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Concepcion* at 344.

That the contractual language that bars "collective" remedies for employment disputes also applies to litigation as well as arbitration does not make it less inimical to arbitration, nor does it make it a "generally applicable" defense. Section 7 of the NLRA is not a ground for the revocation of "*any* contract," because only one type of contract – employment contracts – is subject to the NLRA. *Id.* (emphasis added); *see Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984) and section 7 is being invoked to frustrate arbitration.

Finally, if the NLRA were construed to prohibit class waivers, it would "interfere[] with fundamental attributes of arbitration," *Concepcion*, 563 U.S. at 344, and the saving clause does not apply to any defense that disfavors arbitration's "defining features." *Kindred Nursing Ctrs. Ltd. P'ship* v. *Clark*, 137 S. Ct. 1421, 1426 (2017).

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[9](...continued)

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed and the judgments of the Courts of Appeals for the Seventh and Ninth Circuits should be reversed.

Respectfully submitted,

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